Office - Supreme Court, U.S.
FILED
SEP 20 1982
CLERK

No. 82-84

In the Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

TABLE OF AUTHORITIES

Cases:	Page
Garment Workers v. *Quality Manufacturing Co.*, 420 U.S. 276	7
Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274	5
NLRB v. *Eldorado Manufacturing Corp.*, 660 F.2d 1207	6
NLRB v. *Solboro Knitting Mills, Inc.*, 572 F.2d 936, cert. denied, 439 U.S. 864	7
Radio Officers' Union v. *NLRB*, 347 U.S. 17	4, 5
Universal Camera Corp. v. *NLRB*, 340 U.S. 474	7
Woelke & Romero Framing, Inc. v. *NLRB*, No. 80-1789 (May 24, 1982)	7
Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, enf'd, 662 F.2d 899, cert. denied, No. 81-987 (Mar. 1, 1982)	5, 6

Statute:	
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
Section 8(a)(1), 29 U.S.C. 158(a)(1)	2
Section 8(a)(3), 29 U.S.C. 158(a)(3)	3, 4, 5, 6
Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	1, 2
Section 8(b)(2), 29 U.S.C. 158(b)(2)	2, 5
Section 10(e), 29 U.S.C. 160(e)	7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-94

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The Board found that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by threatening members Kuebler and Curd with loss of employment because they had exercised their rights under the Act, and by refusing to process their grievances because they had filed unfair labor practice charges under the Act. It further found that the Union violated Sec-

tion 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by falsifying Kuebler's and Curd's employment records, refusing to refer them for employment, and ultimately causing them to be discharged because they had exercised their rights under the Act. The Board also found that the Union violated Section 8(b)(1)(A) and (2) of the Act by filing false intraunion charges against members Curd, Kuebler, Katsaros and Kudla, and by suspending Curd and expelling Kuebler, Katsaros, and Kudla from union membership because they had exercised their rights under the Act.[1] The petition contests only the Board's finding that the Union was responsible for Curd's and Kuebler's discharges.

1. Willets Point Contracting Corporation ("Willets"), an asphalt supply and paving company in New York City, operates under a collective bargaining agreement with the Union covering its drivers (Pet. App. 16a-18a). Willets assigns work to its drivers under a set of rules and practices that is known as the "shape" system and is based primarily on seniority (*id.* at 19a-20a). Under the shape system in effect at Willets during the relevant time, drivers were required to appear at the "shape trailer" for job assignments at least once a week (*id.* at 27a). The shape system at Willets was run exclusively by Union steward Worhacz (*id.* at 68a-69a).

Charles Curd and John Kuebler, long-time Willets drivers, were discharged by Willets in October 1977

---

[1] In addition, the Board found that the Frank Mascali Construction Co. and Frank Mascali Construction G.C.P. Co. violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by accepting and condoning a referral arrangement with the Union that discriminated against Kuebler and Curd because they had exercised their rights under the Act (Pet. App. 3a).

because Willets believed they had not fulfilled their obligations under the shape system (Pet. App. 102a-103a). In fact, the two employees had fulfilled their obligations, but Union steward Worhacz had falsified the number and frequency of their shapes because of his hostility to their dissident union activity (*id.* at 71a-73a). Indeed, when Willets' job superintendent remarked to Worhacz that the records reflected that Curd and Kuebler were not shaping frequently enough, Worhacz did not disagree (*id.* at 104a).

In finding that the Union violated the Act by causing the discharge of the two employees, the administrative law judge (ALJ), whose decision was upheld by the Board, explained (Pet. App. 107-108) that

> the one day a week shape was still in effect in October; Kuebler and Curd had satisfied their obligations to shape once a week through October 21; the employer Willets Point had delegated total responsibility for the maintenance of shape records to the Union's shop steward; and those records, through deliberate falsification and manipulation, showed that Kuebler and Curd had not shaped. Thus I find and conclude that the discharges of Kuebler and Curd were caused by the Union as a further manifestation of the discriminatory scheme devised and implemented by Worhacz in retaliation to [*sic*] the protected concerted activity of Kuebler and Curd in violation of Section 8(b)(1)(A) and (2) of the Act.

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-6a). The court stated (*id.* at 4a-5a):

> The Union vigorously contests the findings of violations, but most of its contentions challenge

the credibility determinations made by the ALJ and accepted by the Board. We see no basis to disturb them. We also find the record sufficient to support the Board's finding that Worhacz was acting as the agent of the Union. *See NLRB v. Local 3 IBEW*, 467 F.2d 1158 (2d Cir. 1972). We need not determine whether the Board's current test for determining causation when action is taken because of dual motivation, *see NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3693 (Mar. 2, 1982), is applicable to a Board decision rendered prior to *Wright Line*, because in this proceeding the Union's essential position was denial of a wrongful motivation, not that a wrongful motivation played only a minor part in an otherwise justified action.

2. The Union does not contest the Board's finding, upheld by the court of appeals, that Union steward Worhacz deliberately falsified the shape records and misled Willets in order to retaliate against Curd and Kuebler for engaging in dissident union activities. Rather, the Union contends (Pet. 8-11) that the Board improperly dismissed an unfair labor practice charge against Willets, thereby precluding a finding of whether Willets would have discharged Curd and Kuebler for reasons other than their supposed failure to meet their shape obligations, a finding that the Union contends is necessary before it can be held responsible for the discharges. There is no merit to this contention.

The Union concedes (Pet. 8) that this Court held in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 53-54 (1954), that a finding of a violation of Section 8(a)(3) by an employer is not a prerequisite to a

finding of a violation of Section 8(b)(2) by a union. In that case, the Court concluded (347 U.S. at 53; footnote omitted) that a finding of a violation of Section 8(b)(2) "requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8(a)(3)."[2]

As the court of appeals correctly noted (see page 4, *supra*), the Union's reliance on the Board's *Wright Line* test (Pet. 9-13) is misplaced. In *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982), the Board applied to the Section 8(a)(3) context the test established in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), for determining whether a school board's discharge of a nontenured teacher violated the Constitution where the discharge was based in part on the employee's constitutionally protected activities.[3] The Board thus held (251 N.L.R.B.

---

[2] In *Radio Officers*, as here, the Section 8(b)(2) violation was based on findings that the employer had denied a union member employment at the instigation of the union, and that the union's purpose in causing the unfavorable treatment was to coerce compliance with union rules or practices. 347 U.S. at 28-33.

[3] The Court enunciated the following rule in *Mt. Healthy, supra*, 429 U.S. at 287 (footnote omitted):

> Initially, * * * the burden was properly placed upon [the teacher] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. [The teacher] having carried that burden, however, the District Court should have gone on to determine whether

at 1089) that in a Section 8(a)(3) discharge case its General Counsel is required to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," after which the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Here, however, the issue is not the employer's motive in discharging the employees, and the union is not contesting the finding that it was motivated by unlawful considerations. Moreover, the Union did not contend that Curd and Kuebler were discharged for any reason other than their supposed failure to meet the shape obligations. In any event, even if there were such evidence, the failure of the Board to issue a complaint against Willets would not have precluded the Union from raising it.[4]

Thus, the only issue actually presented by petitioner is whether the Board's findings, upheld by the court of appeals, are supported by substantial evidence. That evidentiary issue does not warrant re-

---

the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

[4] *NLRB* v. *Eldorado Manufacturing Corp.*, 660 F.2d 1207 (7th Cir. 1981) (Pet. 12-13), does not support petitioner's contention. The *Wright Line* analysis was employed there to determine the motivation for the Union's seeking the employees' discharge, not the reasons why the employer in fact discharged them. Moreover, in that case there was a question of mixed motivation—whether the employees had been discharged because of their engaging in protected intraunion activities or because of their gross misconduct.

view by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

SEPTEMBER 1982

---

[5] The Union also contends (Pet. 13-20) (1) that the Board erroneously concluded that Worhacz was its agent and (2) that the finding that the Union violated the Act by causing Willets to discharge Kuebler and Curd cannot be upheld because that theory was not pleaded in the General Counsel's complaint. The Union did not raise these arguments before the Board. Accordingly, under Section 10(e) of the Act, 29 U.S.C. 160(e), the Union is precluded from raising them here. *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20; *Garment Workers* v. *Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1975). In any event, there is no merit to these contentions. First, the court of appeals found that the finding of Worhacz' agency status was supported by the evidence (Pet. App. 4a-5a). Second, the Board is not prohibited from finding related violations not alleged in the complaint as long as the parties understood the issues and had full opportunity to present their case on those issues. *NLRB* v. *Solboro Knitting Mills, Inc.*, 572 F.2d 936, 944 (2d Cir.), cert. denied, 439 U.S. 864 (1978). During the hearing before the administrative law judge, the parties litigated Worhacz' control of the shape records, the veracity of those records, Willets' reliance on Worhacz' records in discharging Kuebler and Curd, and Worhacz' knowledge of Willets' reliance. In addition, Worhacz' shape records themselves were introduced into evidence at the hearing. The Union thus was afforded due process.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 567051 1112